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In The
SUPREME COURT OF THE UNITED STATES
October Term - 1983

THE CLASS OF OWNERS AND LESSORS OF MULTIPLE FAMILY RESIDENTIAL BUILDINGS CONSTRUCTED IN THE CITY OF RACINE DURING OR AFTER 1963 WHICH CONTAIN FIVE OR MORE DWELLING UNITS PER BUILDING WHERE GARBAGE (REFUSE AND SOLID WASTE) COLLECTION AND REMOVAL INVOLUNTARILY NEVER EXISTED OR HAS BEEN INVOLUNTARILY DISCONTINUED,

HENRY CARPENTER, Representative Member,

Petitioners,

vs.

COMMISSIONER OF PUBLIC WORKS OF THE CITY OF RACINE, WISCONSIN,

Respondent.

On Appeal from the Appellate Court of Wisconsin (District II); on petition for review to the Supreme Court of Wisconsin.

Petition for Certiorari

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S RESTATED QUESTIONS PRESENTED FOR REVIEW

1. Whether a notice of claim pursuant to §895.43, Stats. (now §893.80), which complies with the technical requirements for a claim of only one individual can be sufficient to enforce a class claim against a municipal employee.

2. Whether temporary disparate treatment of owners of apartment buildings of five or more units with respect to city solid waste collection constituted an unconstitutional denial of equal protection under the law.

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JURISDICTION

The Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). Respondent denies that this Court's jurisdiction has been properly invoked.

STATEMENT OF CASE

Facts critical to the Court's understanding of the action in relation to the issues raised were omitted or misstated in the Petitioners' Statement of Case. The summons and complaint commencing this action were served on August 22, 1980. The sole defendant named in the action was the Commissioner of Public Works of the City of Racine. On August 22, 1980, an Alternative Writ of Mandamus was also served. The defendant, Respondent here, moved to quash the Alternative Writ of Mandamus and, on February 17, 1981, the court entered a decision granting the motion to quash. The Respondent also moved to dismiss the action

and, following a hearing on the matter, on December 18, 1981, the court entered a memorandum decision granting the Respondent's motion to dismiss. The court granted the plaintiffs (Petitioners here) leave to amend the complaint. On January 18, 1982, Petitioners filed an amended summons and amended complaint. Upon Respondent's motion to dismiss the amended complaint, on February 15, 1982, the court granted the motion, thereby requiring Petitioners to amend their complaint to more narrowly define the class alleged. On February 25, 1982, Petitioners served a re-amended summons and re-amended complaint. On April 5, 1982, Respondent moved to decertify the class and to decertify the class claim for money damages. Following a May 3, 1982, hearing on Respondent's motion, the circuit judge deferred consideration of the motion until completion of Petitioners' class discovery. On July 26, 1982, upon

termination of Petitioners' discovery time, Respondent renewed its motion for decertification. The court denied Respondent's motion but entered an order requiring Petitioners to provide Respondent with notice of individual class members. The Respondent, by affidavit on August 12, 1982, presented information to the court placing in doubt the actual status of persons claimed by Petitioners' counsel to be class members. The court, however, denied Respondent's motion to decertify. The trial court did not, at any time, require the petitioners to certify the class alleged.

At trial the evidence showed that Respondent Commissioner of Public Works assumed that position in 1963. At that time he determined that the solid waste collection policies used by the City were not consistent and were arbitrary. He immediately began reviewing the system and urged the Public Works and Services Committee and the

Common Council to provide for a uniform solid waste collection system. Those continued efforts culminated in 1978 when the Common Council amended its ordinance and, with respect to this action, provided that no apartment building of five or more dwelling units would receive City solid waste collection. The Respondent thereupon applied for and received EPA funding for a study of the overall solid waste collection system. Following completion of the study more than 18 months later, Respondent obtained further changes by the Common Council and instituted all changes in solid waste collection in September, 1981. Such changes included termination of service to multi-family buildings of five or more units as well as curbside pick up. A small number of such multi-family dwellings inadvertently were not initially given notice of termination, but upon discovery of that fact were notified and terminated by March 1,

1982.

The case Shorehaven v. The Commissioner of Public Works for the City of Racine, Case No. 74-531, Petitioner's appendix page A36, was a mandamus action upon which a decision was issued by the circuit court in late 1978. The Common Council of the City of Racine directed that the City Attorney's Office appeal said decision, but the plaintiffs in that matter did not at any time reduce the decision to judgment. Therefore, the appeal did not go forward.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Jurisdiction of this Court under 28 USC §1257(3) is not present. The state statute in question, §895.43, Stats. (now §893.80), is a procedural statute relating to administration of claims against public bodies and their employees. The legislature

enacted specific requirements which are a prerequisite to advancing such claims to suit and the Wisconsin Courts have strictly interpreted such provisions. No federal question is presented with respect to such statute, nor can it reasonably be claimed that the statute as interpreted by the Wisconsin Court of Appeals is repugnant to the Federal Constitution.

The federal question raised by the Petitioner claiming a violation of equal protection of the laws is an insubstantial federal constitutional question. The classification of apartment buildings containing five or more units is not a suspect classification and solid waste collection is not a fundamental right. The Wisconsin Court of Appeals found that there was a rational basis for the Respondent's policy. Therefore, this Court should not take jurisdiction to review this matter.

If jurisdiction is accepted, review of

§895.43, Stats., will disclose that prerequisites to bringing suit against a governmental subdivision or its officers or employees are strict and are strictly interpreted. The Wisconsin Supreme Court has held that at a minimum such a class claim for money damages must identify the claimants and show that the claims are made by their authority. The Petitioner's class claim did not include the necessary information. Since the prerequisites to a lawsuit were not met with respect to any claimant except the individual petitioner, the class was properly ordered decertified by the Wisconsin Court of Appeals.

That Court addressed the equal protection question from two standpoints. It found that the class of apartment buildings with five or more units is not a suspect class and that solid waste collection is not a fundamental right. Having made those determinations, the Court found that a

rational basis for the Respondent's policy existed.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT RAISE IMPORTANT AND SPECIAL REASONS REQUIRED BY SUPREME COURT RULE 17 AS A PREREQUISITE FOR REVIEW BY THIS COURT.

Supreme Court Rule 17 provides this Court with guidelines insuring that review on writ of certiorari will be limited to those cases which present special and important reasons for such review. The reasons specified concentrate on application of federal law by other federal courts or state courts of last resort where the decision departs from the accepted and usual course of judicial proceedings or where state court decisions conflict with other state courts or a Federal Court of Appeals.

The Petitioners have not pointed out the grounds contained in Rule 17 which would warrant the Court to accept review of the matter. The issue presented which relates to an interpretation of state statutory law is not shown to be in conflict with any other state court or the Federal Courts of Appeal. The statute has been consistently interpreted by the Wisconsin appellate courts to require strict compliance with notice and claim requirements. Raisanen v. Milwaukee, 35 Wis. 2d 504, 151 N.W. 2d 129 (1967); Gutter v. Seamandel, 103 Wis. 2d 1, 308 N.W. 2d 403 (1981). The Wisconsin Court of Appeals decided the class claim question consistently with the opinion of the Wisconsin Supreme Court in Hicks v. Milwaukee County, 71 Wis. 2d 401, 238 N.W. 2d 509 (1976). A writ of certiorari should not be granted merely to review a decision which is consistent with the law of the state concerned when there is no conflict in

that law with other states or with federal courts.

The Petitioners claim that the issue of equal protection of the laws justifies this Court to accept review. This federal question has not been accurately shown to be in conflict with applicable decisions of this Court. The Wisconsin Court of Appeals did not misread the facts of the case, as claimed by the Petitioners, but addressed the two classifications which were pertinent to a proper decision in the matter. The Court of Appeals found that a rational basis for the Respondent's action existed and further found no evidence to support Petitioners' claims that they were the victims of intentional, systematic, or arbitrary discrimination.

The concepts of suspect classifications and fundamental rights were considered by the Court of Appeals. It declined to subject the Respondent's actions to strict

scrutiny, as would be appropriate if a suspect classification or fundamental right was involved. San Antonio School District v. Rodriguez, 411 U.S. 1, 36 L. Ed. 16, 93 S. Ct. 1278 (1973); Dandridge v. Williams, 397 U.S. 471, 25 L. Ed. 491, 90 S. Ct. 1153 (1970). Since the Wisconsin Court of Appeals decided the case in conformance with relevant federal decisions, the grounds of Supreme Court Rule 17 which would authorize jurisdiction are simply not present. Therefore, review should not be granted.

II.

THE WISCONSIN COURT OF APPEALS INTERPRETATION OF §895.43, STATS., IS CONSISTENT WITH STATE AUTHORITY AND DOES NOT VIOLATE PETITIONERS' RIGHTS.

The Wisconsin Legislature has long imposed stringent requirements as conditions precedent to maintaining a suit against a municipality. The Wisconsin Supreme Court as well as the Wisconsin Court of Appeals have strictly interpreted such provisions.

The Court of Appeals affirmed summary judgment for the defendants in Zinke v. Milwaukee Transport Services, Inc., 99 Wis. 2d 506, 299 N.W. 2d 600 (Ct. App. 1980). Strict interpretation of §895.43(1)(b), Stats., sustained the requirement that a written claim be filed and disallowed before an action can be commenced against a governmental organization. Substantial compliance with the notice of claim requirement was not acceptable. The Wisconsin Supreme Court in Pattermann v. Whitewater, 32 Wis. 2d 350, 145 N.W. 2d 705 (1966), sustained the trial court's granting of summary judgment for the defendant because the requirements of §895.43 and §62.25, which later was incorporated into §895.43, were not strictly complied with. Those provisions were also strictly interpreted by that Court in Raisanen v. Milwaukee, supra.

Bearing in mind the traditional strict interpretation of §895.43, it is not

surprising that the Wisconsin Court of Appeals in this case also strictly interpreted the statute, in the same manner in which a very similar statute was interpreted in Hicks v. Milwaukee County, supra. Relying on Hicks, the Court of Appeals found that the notice of claim filed by Petitioners did not meet the minimum standard for asserting claims against a governmental entity by a member of a class. The Court stated:

> The Respondent attempts to distinguish Hicks by pointing out factual dissimilarities between the cases. We find no legal significance in these differences. (Appendix of Petitioners, pages A6 to A7.)

Although Petitioners claim that this case is distinguished from Hicks due to the fact that mandamus was requested by Petitioners, it should be noted that the writ of mandamus served with the original complaint in this action was quashed by the

trial court. That action of the court was not appealed and mandamus was not requested in the amended complaint nor in the second amended complaint of Petitioners. Therefore, in this case as in Hicks, Petitioners were only requesting monetary relief.

The Petitioners claim that Respondent had notice of each potential claim because statistics were available showing the number of units of such apartment buildings not provided with solid waste collection. Testimony at trial indicated that since the City of Racine did not provide dumpster type service, many apartment building owners contracted for private solid waste collection with dumpster service. Such service ameliorated health problems associated with a high concentration of individual garbage cans located outside large apartment facilities.

The decision in Shorehaven v.

Commissioner of Public Works, supra, could not be considered notice that Petitioners' class asserted a monetary claim against Respondent. The Shorehaven plaintiffs did not assert a monetary claim but merely brought a writ of mandamus against the Commissioner of Public Works. A belated decision in the matter was in favor of Shorehaven, and the Common Council of the City of Racine authorized an appeal of the case. The Shorehaven plaintiffs failed to file a judgment in the matter and, consequently, no appeal of the decision was actually taken.

The Petitioners repeatedly and incorrectly argue that the Respondent admitted that he made arbitrary decisions with respect to solid waste collection. The record shows that the allegation is false and that the arbitrary decisions referenced were made prior to Respondent's employment as Commissioner of Public Works. The testi-

mony showed that the decisions made by Respondent were not arbitrary but, to the contrary, were designed to result in a uniform policy of solid waste collection.

The Wisconsin Court of Appeals properly applied the rule in Hicks, supra, and gave credence to prior decisions of the Wisconsin Supreme Court and Court of Appeals by requiring strict compliance with §895.43, Stats. Therefore, the Wisconsin Supreme Court properly denied review and, this Court should likewise decline review of the action.

III.

PETITIONERS' RIGHT TO EQUAL PROTECTION OF THE LAWS WAS NOT VIOLATED BY RESPONDENT'S SOLID WASTE COLLECTION CLASSIFICATIONS OR BY THE TEMPORARY UNEQUAL TREATMENT OF PETITIONERS' CLASS.

Contrary to Petitioners' allegation that the Wisconsin Court of Appeals misread the facts in this case, that Court applied long

established constitutional standards to both the classification established by Respondent and Respondent's temporary unequal treatment of Petitioners' class. The Wisconsin Court of Appeals properly found that the separation of apartment buildings for purposes of solid waste collection into a group of those which contained five or more units and those which contained four or less units was not a suspect class. The Seventh Circuit Court of Appeals, in considering a similar class, found that suspect classifications include race, national origin, alienage, indigency, or illegitimacy, and did not include a class related to the pick-up of solid waste. Goldstein v. City of Chicago, 504 F. 2d 989 (1974). That case also established that public garbage collection is not a fundamental right. Fundamental rights are those which are either explicitly or implicitly guaranteed by the Constitution. San Antonio

School District v. Rodriguez, supra. In a case which addressed a limitation on the amount of public welfare payments which a family could receive, this Court stated:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 55 L. Ed 369, 377, 31 S. Ct. 337. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations,--illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 U.S. 61, 69 - 70, 57 L. Ed. 730, 734, 33 S. Ct. 441.'

Dandridge v. Williams, supra. This Court has also held that legislative bodies have broad scope to experiment with economic

problems and that courts are not to substitute their judgment for that of legislatures with regard to social and economic matters. Ferguson v. Skrupa, 372 U.S. 726, 732, 10 L. Ed. 2d 93, 98, 83 S. Ct. 1028 (1963). It was there stated:

> Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution.

Under the above tests, the classification established was proper. The remaining question is whether the temporary unequal treatment within the class violated equal protection of the laws. Guidance on this question is given by two Wisconsin Supreme Court cases. State ex rel. Cities S. O. Co. v. Board of Appeals, 21 Wis. 2d 516, 544, 124 N.W. 2d 809 (1963), was a zoning matter raised by writ of certiorari. The issue was whether the revocation of a building permit constituted a discriminatory

enforcement of the zoning ordinance so as to result in violation of constitutional rights. The Court stated:

> Even if there had been evidence that the city itself had enforced the ordinance in one instance and not in others, this would not in itself establish a violation of the equal-protection-of-the-laws clause of the Fourteenth Amendment.

The Court cited an earlier case which explained that a denial of equal protection did not result unless an element of intentional or purposeful discrimination was shown. Village of Menomonee Falls v. Michelson, 104 Wis. 2d 137, 145, 311 N.W. 2d 658 (1981), upheld a village ordinance relating to discharge of clear water into the sanitary sewer system. The plaintiff claimed that the village was enforcing the ordinance only against 50% of the real estate parcels which had a drain connection in violation of the ordinance, allegedly violating her right to equal protection of

the law. The Court disagreed, holding that evidence of unequal enforcement does not in itself establish a violation of the equal protection clause. The Court stated:

> There must be a showing of an intentional, systematic and arbitrary discrimination. State ex rel Murphy v. Voss, 34 Wis. 2d 501, 510, 149 N.W. 2d 595, 599 (1967).

The testimony in this case showed that there was an economic need to establish classifications of property which would not receive solid waste collection at public expense. Testimony also showed that the Respondent attempted to redesign the system to obtain uniformity. The Common Council and appropriate committees considered the matter over a length of time and finally, following federally funded studies, the uniform system was implemented. Applying the above authorities to the facts as shown by the testimony, the Petitioners' right to equal protection of the laws was not violated.

CONCLUSION

The petition for writ of certiorari fails to address an issue of such importance that the Court should take jurisdiction of this matter. The state statute in issue does not present a federal question. The allegation of a violation of Petitioners' right to equal protection of the laws does not present a substantial federal question because the decision of the Wisconsin Court of Appeals follows accepted constitutional standards under both state and federal law. The Wisconsin Supreme Court declined review of this matter, and the Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Dated: February 29, 1984

Respectfully submitted,

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